Journal of Criminal Law and Criminology

Volume 76 | Issue 4 Article 10

1986

# Determining the Reasonable Length of a Terry Stop--Fourth Amendment: United States v. Sharpe, 105 S. Ct. 1568 (1985)

David J. Kulowiec

0091-4169/85/7604-1003
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 76, No. 4

Printed in U.S.A.

# FOURTH AMENDMENT—DETERMINING THE REASONABLE LENGTH OF A *TERRY* STOP

## United States v. Sharpe, 105 S. Ct. 1568 (1985).

### I. INTRODUCTION

In *United States v. Sharpe*,[1] the Supreme Court considered whether a police officer violated an individual's fourth amendment rights when the officer detained the suspect without probable cause for arrest.[2] The Court held that the seizure of respondent Donald Savage was constitutionally valid because law enforcement officials diligently pursued a viable means of investigation to dispel their reasonable suspicion that the respondent was involved in illegal drug trafficking.[3] In reaching its decision, the majority in *Sharpe* established a "diligence test" to determine if, in the absence of probable cause, the duration of the seizure was sufficiently limited in scope so as not to constitute an illegal *de facto* arrest.[4]

This note will examine the Supreme Court's reasoning in *Sharpe* and will distinguish the two tests that the majority and Justice Marshall, in his separate concurrence, advocate for determining the proper time limit of non-probable cause seizures.[5] This note will then assess which test is more appropriate in light of the Supreme Court's rationale in *Terry v. Ohio* and subsequent fourth amendment cases.[6]

### II. HISTORICAL BACKGROUND

In interpreting the fourth amendment's prohibition against un-

---

1 105 S. Ct. 1568 (1985).

2 *Id.* The text of the fourth amendment reads:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

3 United States v. Sharpe, 105 S. Ct. 1568, 1576 (1985).

4 *Id.* at 1575. *See infra*, text accompanying notes 109-10.

5 *See infra* text accompanying notes 150-63.

6 *See infra* text accompanying notes 163-76.

reasonable searches and seizures, the Supreme Court has undergone two distinct phases. Prior to 1968, the Supreme Court held that only those searches and seizures based on probable cause were reasonable.[7] The Supreme Court construed probable cause to be "more than bare suspicion."[8] In *Carroll v. United States*,[9] the Supreme Court concluded that probable cause exists if the facts are such that a reasonable man would believe that a suspect is committing or has committed an offense.[10] In the landmark case of *Terry v. Ohio*,[11] however, the Supreme Court decided that, in certain circumstances, probable cause was not a prerequisite for constitutionally valid searches.[12]

### A. *TERRY V. OHIO*

In *Terry*, a police officer frisked two men whom he suspected of "casing" a store and possibly carrying weapons.[13] The officer un-

---

[7] *See* Brinegar v. United States, 338 U.S. 160 (1949); *see also* Henry v. United States, 361 U.S. 98 (1959).

[8] *Brinegar*, 338 U.S. at 175. In *Brinegar*, federal agents stopped the petitioner's car and interrogated him. The petitioner admitted that he possessed twelve cases of liquor, which the agents subsequently seized. Upon conviction on charges of illegally transporting liquor, the petitioner claimed that the agents had violated his fourth amendment rights. Relying heavily on Carroll V. United States, 267 U.S. 132 (1925), the Supreme Court held that the federal agents possessed probable cause when they stopped the petitioner. *Id.* at 177-78. The Court emphasized the following facts: one of the agents had arrested the petitioner five months earlier on similar charges, the agent had observed the petitioner loading large quantities of liquor into a vehicle on previous occasions, and the vehicle was travelling in the vicinity of Joplin, Missouri, a known supply source of liquor for Oklahoma (which at the time was a "dry" state). *Id.* 167-70. *See generally* Armentano, *The Standards for Probable Cause Under the Fourth Amendment*, 44 CONN. L.J. 137 (1970).

[9] 267 U.S. 132 (1925). In *Carroll*, federal prohibition agents stopped the petitioner's car just outside Grands Rapids, Michigan. Upon searching the vehicle the agents discovered 68 bottles containing whiskey and gin. Several months earlier, the agents had unsuccessfully attempted to purchase liquor from the petitioner in an attempt to uncover evidence of illegal alcohol trafficking. Acknowledging the agents' previous encounters with the petitioner along with the fact that the petitioner was travelling in the vicinity of Detroit, which was an active center for liquor smuggling, the court held that the agents possessed probable cause when they searched the petitioner's vehicle. *Id.* at 160. As such, the Court upheld the petitioner's conviction on drug smuggling charges. *Id.* at 162.

[10] *Id.* at 161-62.

[11] 392 U.S. 1 (1968).

[12] *Id.*

[13] Officer McFadden, a policeman who had patrolled the same area for thirty years, observed two men acting suspiciously. The two alternately passed in front of a store window approximately twenty-four times. Eventually, the two suspects joined a third individual several blocks away from the store. Officer McFadden approached the three individuals and asked their names. After the suspects responded with only a mumbled reply, Officer McFadden turned petitioner around and frisked his outer clothing. Officer McFadden subsequently frisked the other suspects. *Id.* at 5-8.

covered two revolvers during his brief search.[14] The majority in *Terry* held that a police officer with only *reasonable suspicion* of criminal activity had the right to stop and briefly frisk a suspect's outer clothing.[15]

In coming to its decision, the *Terry* majority introduced a two pronged test to determine whether a search based on reasonable suspicion is constitutionally valid.[16] Courts must first decide whether the police initially had the right to carry out the search and/or seizure.[17] Then, courts must determine if the intrusion was "reasonably related in scope to the circumstances which justified the interference in the first place."[18] The *Terry* majority applied a balancing test to determine whether Officer McFadden was initially justified in frisking petitioner Terry.[19] The majority stated that the government's interest in police safety outweighed the limited intrusion on the suspect's fourth amendment rights.[20] Therefore, the Court held that the police action was initially justified.

The majority, however, gave very few guidelines for determining the proper *scope* of a police detention without probable cause. Instead, the majority narrowly analyzed the facts in *Terry*. Because safety concerns initially justified the brief search of the suspect, the majority found that Officer McFadden's actions were sufficiently limited in scope, as they were directed toward the discovery of weapons and not toward the discovery of other incriminating evidence.[21] The majority did state, however, that a police intrusion pursuant to reasonable suspicion must not reach the level of intrusiveness of an arrest.[22]

---

14 *Id.* at 7.

15 *Id.* at 30-31.

16 *Id.* at 20.

17 *Id.*

18 *Id.*

19 *Id.* at 20-21. The *Terry* majority relied on the Supreme Court's previous decision in Camara v. Municipal Court, 387 U.S. 523 (1967), to justify its use of the balancing test. *Terry*, 392 U.S. at 21. In *Camara*, the Supreme Court considered whether a San Francisco resident had the right to deny city housing inspectors access to his dwelling if those inspectors did not possess a warrant. *Camara*, 387 U.S. at 27-28. The Court held that according to the facts of the case city inspectors did need a warrant. *Id.* at 533-34. However, the Courts also said that in order to obtain a warrant city inspectors did not need to possess the level of probable cause traditionally mandated by courts. *Id.* at 539. Realizing that safety inspections are the most effective means to enforce adherence to municipal codes, the Court stated: "If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted warrant." *Id.*

20 *Terry*, 392 U.S. at 23-24.

21 *Id.* at 29-30.

22 *Id.* at 25-26.

B. *TERRY*'S PROGENY

Subsequent to *Terry v. Ohio*, the Supreme Court has applied the reasonable suspicion standard to seizures,[23] as well as, searches. The Court affirmed that so-called "*Terry* stops," i.e., seizures based only on reasonable suspicion, were permissible under the fourth amendment.[24] Although the Supreme Court rendered a number of decisions concerning *Terry* stops, the majority of these cases focussed on whether police were initially justified in making the stop and not on the scope of the stop.[25] Nevertheless, since *Terry*, the Supreme Court has stated in several decisions that *Terry* stops be brief.[26] In addition, the Court has continually emphasized the *Terry caveat* that detentions lacking probable cause must be substantially less intrusive than arrests.[27]

In *United States v. Place*,[28] the Supreme Court, for the first time, extensively considered the time limitations of a *Terry* stop. In *Place*, two Drug Enforcement Administration (DEA) agents seized a suspected drug courier's suitcase and subjected it to a sniff test by a

---

[23] "A person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained." United States v. Mendenhall, 446 U.S. 544, 553 (1979). Note that the Court in *Terry* stated that "not all personal intercourse between policeman and citizens involves 'seizures' of persons." *Terry*, 392 U.S. at 19 n.16. *See generally* Williamson, *The Dimensions of Seizure: The Concepts of "Stop" and "Arrest"*, 43 OHIO ST. L.J. 771 (1982).

[24] *See, e.g.*, Michigan v. Summers, 452 U.S. 692 (1981).

[25] *See* United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (whether *Terry* stops are permissible to detect the transport of illegal aliens): Delaware v. Prouse, 440 U.S. 648 (1979) (whether an automobile *Terry* stop is permissible if the law enforcement officials possess no evidence of an equipment or traffic violation but merely want to check the driver's license and car registration); Michigan v. Summers, 452 U.S. 692 (1981) (whether a warrant to search for contraband founded on probable cause carries with it the limited authority to detain the occupants of the premises); Florida v. Royer, 460 U.S. 491 (1983) (whether *Terry* stops are permissible to detect illegal trafficking in narcotics).

[26] *See, e.g.*, Adams v. Williams, 407 U.S. 143 (1972). In *Adams*, the court stated, "A *brief* stop of a suspicious individual, in order to determine his [the suspect's] indentity or maintain the status quo momentarily while obtaining more information, may be most reasonable . . . ." *Id.* at 146 (emphasis added). Similarly, in United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975), the Court held that a patrol officer near the Mexican border could stop a car "briefly" if he possessed reasonable articulable suspicion that illegal aliens were inside. Furthermore, Justice Brennan had succinctly stated that: "*Terry* encounters must be brief." Kolender v. Lawson, 461 U.S. 352, 365 (1983). (Brennan, J., concurring).

[27] *See* United States v. Place, 462 U.S. 696, 705 (1983). Justice O'Connor stated that "the *Terry* exception to the probable-cause requirement is premised on the notion that a *Terry*-type stop of the person is substantially less intrusive of a person's liberty interests than a formal arrest." *Id. See also* Dunaway v. New York, 442 U.S. 200 (1979). In *Dunaway*, the Supreme Court specifically held that the detention of the suspect was unconstitutional because it approached the intrusiveness of an arrest. *See infra* note 101.

[28] 462 U.S. 696 (1983).

trained narcotics dog.[29] The detention of the luggage lasted approximately ninety minutes.[30] Stating that *Terry* stop limitations apply to possessions as well as persons, the Court held that the ninety minute seizure exceeded the permissible length of a *Terry* detention.[31] The majority pointed out, however, that the DEA agents' failure to inform the suspect of the whereabouts of his luggage and what arrangements would be made for its return were circumstances that also influenced its decision.[32]

Writing for the majority in *Place*, Justice O'Connor produced seemingly varied perspectives for interpreting the scope of *Terry* stops. Initially, Justice O'Connor stated that the nature and extent of a *Terry* stop must be "minimally intrusive."[33] Justice O'Connor later suggested, however, that courts should assess the length of a stop by giving due consideration to whether police diligently pursued their investigation.[34] Furthermore, in a footnote, she rejected the American Law Institute's recommendation of a twenty minute maximum time limit for *Terry* stops.[35] Justice O'Connor reasoned that such a limitation would unnecessarily restrict the needs of law

---

29 In *Place*, law enforcement officials suspected the respondent of illegal drug trafficking at Miami International Airport. The law enforcement officials approached the respondent and began to question him. Although the respondent consented to a search of his luggage, the law enforcement officials decided to forego the search because the respondent's flight was about to depart. The Miami officials, however, called DEA agents in New York who were waiting for the respondent at New York's LaGuardia Airport. After being confronted by the New York agents, the respondent refused to consent to a search of his luggage. The agents seized the luggage and transported it to Kennedy Airport where they subjected it to a sniff test by a narcotics detection dog. The dog gave a positive response to one of the pieces of luggage. 462 U.S. at 698-99.

30 The actual time the DEA agents had possession of the luggage exceeded ninety minutes. However, ninety minutes elapsed before the drug detection dog reacted positively to the luggage. *Place*, 462 U.S. at 699. At that point the DEA agents had probable cause to arrest.

31 *Id.* at 710.

32 "We note that here the New York agents knew the time of Place's scheduled arrival at LaGuardia, had ample time to arrange for their additional investigation at that location, and thereby could have minimized the intrusion on respondent's Fourth Amendment interests." *Id.* at 709.

33 *Id.* at 703.

34 *Id.* at 709.

35 *Id.* at 709 n. 10. The American Law Institute Code suggests that a law enforcement officials may stop a person "for such period as is reasonably necessary for the accomplishment of the purposes authorized . . . , but in no case for more than twenty minutes." MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.1(1) (Proposed Official Draft 1975). The reasoning behind this proposal is as follows: "a period of twenty minutes should suffice to obtain from the person stopped an identification, to ascertain whether the person is prepared to cooperate in the investigation, to check headquarters, and to determine what further action to take. A period greatly in excess of twenty minutes would be much harder to justify on the comparatively informal basis of the stop. It seems preferable to be precise in fixing the period of the stop at twenty minutes. The

enforcement.[36]

## III. THE FACTS IN *SHARPE*

In the morning hours of June 9, 1978, DEA Agent Luther Cooke was patroling the coast of North and South Carolina for possible drug trafficking.[37] "At approximately 6:30 A.M., Cooke noticed a pickup truck with an attached camper shall."[38] The pickup travelled closely behind a Pontiac Bonneville and Cooke surmised that the two vehicles were travelling together.[39] Because the pickup was riding low in the rear and did not bounce appreciably in response to bumps and curves, Cooke believed that it was transporting a heavy load.[40] Furthermore, Cooke observed that quilted material covered the rear window.[41]

Becoming suspicious, Cooke followed the vehicles south for twenty miles and then decided to make an "investigative stop."[42] He radioed a dispatch for assistance to which South Carolina Highway Patrol Officer Kenneth Thrasher responded.[43] After the two officers followed the suspects for several more miles, Cooke radioed to Thrasher to pull over both vehicles.[44]

Thrasher entered the left most lane of the three southbound lanes, drove up alongside the Pontiac, and motioned the driver to pull over.[45] As the automobile began to pull off the road, the pickup truck cut between the Pontiac and the patrol car, nearly hitting Officer Thrasher's vehicle.[46] Thrasher followed the truck as it continued southbound while Cooke stopped the Pontiac.[47]

---

term 'brief time' is vague." MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 283 (Proposed Official Draft 1975).

36 *Place*, 462 U.S. at 709.

37 *Sharpe*, 105 S. Ct. at 1570 n.10. Agent Cooke was travelling in an unmarked car. *Id.*

38 *Id.*

39 *Id.*

40 *Id.* at 1571.

41 *Id.*

42 *Id.*

43 *Id.* Officer Thrasher was operating a marked patrol car. *Id.*

44 *Id.* During the several mile stretch, the pickup and the Pontiac pulled off the highway onto a campground road. Agent Cooke and Thrasher followed the two vehicles as they sped through the campsite at speeds approaching up to sixty miles an hour. All four vehicles subsequently returned to the highway. *Id.*

45 *Id.* Officer Thrasher put on his flashing light during this time. *Id.*

46 *Id.* In its description of the facts, the United States Court of Appeals for the Fourth Circuit did not mention that one of the suspects nearly hit Officer Thrasher's vehicle and continued southbound. *See* Sharpe v. United States, 660 F.2d 967, 968 (4th Cir. 1981).

47 *Sharpe*, 105 S. Ct. at 1570.

Cooke approached the Pontiac, identified himself and requested a driver's license from the operator who police later identified as respondent William Sharpe.[48] Cooke then attempted to radio Thrasher to see if he had successfully stopped the pickup.[49] Unable to contact Thrasher, Cooke radioed to local police for assistance.[50] The police arrived in approximately ten minutes.[51] Cooke subsequently departed to join Thrasher who was about one-half mile down the road.[52]

In the interim, Thrasher had stopped the truck.[53] After searching, respondent Donald Savage and asking for identification and car registration, Thrasher informed him that he would be held until the arrival of Agent Cooke.[54] In response, Savage requested the return of his license and indicated that he wanted to leave.[55] Thrasher denied his requests.[56]

Approximately fifteen minutes after Thrasher stopped the truck, Agent Cooke arrived.[57] Cooke identified himself as a DEA agent and examined Savage's driver's license and the truck's bill of sale.[58] Twice Cooke asked permission to search the camper.[59] In both instances Savage refused.[60] Cooke then approached the rear of the truck, stepped on the bumper and noticed that it only sank slightly.[61] He then put his nose to the window of the camper and stated that he could smell marijuana.[62] Without Savage's permis-

---

48 *Id.* The license bore the name of Raymond J. Pavlovich. *Id.* Sharpe had an additional passenger in the car. At no time did Officer Cooke tell either respondent Sharpe or the passenger why they had been stopped. *Sharpe*, 660 F.2d at 968-69.

49 *Sharpe*, 105 S. Ct. at 1571.

50 *Id.*

51 *Id.* Agent Cooke turned over custody of respondent Sharpe and the passenger to the officers from the Myrtle Beach Police Department. *Id.*

52 *Id.*

53 *Id.* "After stopping the truck, Thrasher had approached it with his revolver drawn, ordered the driver, Savage, to get out and assume a 'spread eagled' position against the side of the truck . . . ." *Id.*

54 Savage produced his own Florida driver's license, but did not produce a registration for the truck. Savage, however, did produce a bill of sale for the truck. The name on the bill of sale was Pavlovich. *Id.*

55 *Id.*

56 *Id.* Thrasher stated that Savage was under custodial arrest and that he could retain respondent Savage because of speeding charges. *Sharpe*, 660 F.2d at 969.

57 *Sharpe*, 105 S. Ct. at 1571.

58 *Id.*

59 *Id.*

60 *Id.* Savage's rationale for refusing was that he was not the owner of the truck. *Id.* at 1571-72.

61 *Id.* at 1572.

62 *Id.* Savage requested Officer Thrasher's opinion once Agent Cooke declared that he smelled marijuana. *Id.* at 1572, 1590 n.18. The Fourth Circuit stated that the smell of raw marijuana gives an officer probable cause for a search. *Sharpe*, 660 F.2d at 971.

sion, Cooke took the keys from the truck, opened the camper, and searched the inside.[63] He discovered a number of highly compressed burlap bales similar to bales of marijuana that he had observed in previous investigations.[64] Cooked then placed respondent Savage under arrest.[65] Returning to the Pontiac, Cooke also arrested respondent Sharpe.[66]

Cooke and Thrasher transported the vehicles and parties to the Myrtle Beach Police Station.[67] That evening, DEA agents took the truck to the Federal Building in South Carolina.[68] Several days later, without a search warrant, Cooke had DEA agents unload the truck and perform chemical tests on the contents of the bales.[69] The results of the tests indicated that the bales were indeed marijuana.[70]

Sharpe and Savage were charged under 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 for possession of marijuana with the intent to distribute.[71] The defendants filed a motion to suppress certain evidence as the product of unlawful searches and seizures.[72] The United States District Court for the District of South Carolina denied the motion and found the defendants guilty as charged.[73]

## IV. The Decisions of the United States Court of Appeals

The United States Court of Appeals for the Fourth Circuit re-

---

63 *Sharpe*, 105 S. Ct. at 1572.

64 *Id.*

65 *Id.*

66 *Id.* Approximately thirty to forty minutes had passed between the initial stop of respondent Sharpe and his subsequent arrest. *Id.*

67 *Id.*

68 *Id.* The Federal Building was located in Charleston, South Carolina. *Id.*

69 *Id.* The truck contained forty-three bales with a combined weight of 2,523 pounds. Cooke had eight bales randomly selected and opened. *Id.* Cooke kept two of the eight bales as evidence. The remainder, under the supervision of the Assistant United States Attorney, were destroyed by fire. *Sharpe*, 660 F.2d at 969.

70 *Id.*

71 *Id.* Section 841(a)(1) of Title 21 of the United States Code states that "[e]xcept as authorized by this subchapter, it shall be unlawful for any person knowingly of intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance . . . ." 21 U.S.C. § 841(a)(1) (1982). Section 2(a) of Title 18 of the United States Code states that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal." 18 U.S.C. § 2(a) (1982). Section 2(b) states that "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." 18 U.S.C. § 2(b) (1982).

72 *Sharpe*, 105 S. Ct. at 1572.

73 *Id.*

versed the District Court's conviction on two grounds.[74] First, the court stated that the fifteen to twenty minute detention of respondent Savage and the thirty to forty minute detention of respondent Sharpe violated the brevity requirement for *Terry* stops.[75] The length of those detentions transformed them into *de facto* arrets.[76] Since the officers made these *de facto* arrests without probable cause the court stated that the evidence obtained from the illegal detention should have been suppressed.[77] Second, the court stated that irrespective of its first argument, Cooked needed a warrant before supervising the search and analysis of the truck's contents several days after the actual stop.[78] Cooke's failure to obtain a warrant rendered the search unlawful.[79] Therefore, the court once again concluded that the corresponding evidence of the bales of marijuana should have been excluded.[80]

The Government petitioned for certiorari. The Supreme Court granted the petition and vacated the circuit court's judgment.[81] The Supreme Court further remanded the case of the circuit court for reconsideration in light of its recent decision in *United States v. Ross*,[82] which expanded the scope of probable cause searches.[83]

---

74 *Sharpe*, 660 F.2d at 973.

75 *Id.* at 970. "The stops and detention in this case cannot be described as brief: Sharpe was detained without probable cause for arrest for thirty to forty minutes before Cooke returned to the Pontiac to arrest him, and Savage was held under custodial arrest for at least fifteen minutes before being questioned and finally arrested by Cooke." *Id.*

76 *Id.*

77 *Id.* at 970-71. The United States Court of Appeals for the Fourth Circuit applied the test established in Wong Sun v. United States, 371 U.S. 471 (1963). In *Wong Sun*, the Supreme Court stated that, given the fact that law enforcement officials have illegally infringed on a suspect's constitutional rights, evidence incriminating the suspect will be admissible depending on whether it was obtained primarily as the result of the illegal action or whether it was obtained by means sufficiently distinguishable from the illegality. *Wong Sun*, 371 U.S. at 488. Only evidence obtained by the latter means is admissible. *Id.* The United States Court of Appeals for the Fourth Circuit stated that Agent Cooke would not have had the chance to smell the marijuana if not for the extended illegal detection. *Sharpe*, 660 F.2d at 971.

78 *Sharpe*, 660 F.2d at 971-72. The Court based its decision on Robbins v. California, 453 U.S. 420 (1981). In *Robbins*, highway patrol officers stopped the petitioner for driving erratically. After smelling marijuana, the officers searched the vehicle finding two packages wrapped in opaque green plastic. Without a warrant, the officers opened the packages, discovering marijuana. *Robbins*, 453 U.S. at 422. The Supreme Court reversed the court of appeals' conviction and held that a closed container in an automobile cannot be opened without a search warrant. *Id.* at 428-29.

79 *Sharpe*, 660 F.2d at 972.

80 *Id.*

81 United States v. Sharpe, 457 U.S. 1127 (1982).

82 456 U.S. 798 (1982). In *Ross*, acting on an informant's disclosure, police stopped a vehicle driven by a suspected narcotics dealer. In conducting a search of the car, police officers opened a brown bag and zippered leather pouch, finding heroin inside. *Id.* at 800-01. Reversing the court of appeals' decision, the Court held that when law enforce-

On remand, the court of appeals upheld its earlier decision.[84] The majority stated that in light of *Ross'* expansion, the absence of a warrant did not render Cooke's search and subsequent analysis of the contents of the truck unconstitutional.[85] The majority, however, maintained its alternative argument that the original detention of the respondents failed to satisfy the brevity requirement of a *Terry* stop.[86] As such, the court of appeals held that the police illegally arrested respondents Savage and Sharpe and that the evidence obtained from this arrest should be suppressed.[87] The Supreme Court once again granted certiorari.[88]

## V. THE SUPREME COURT'S DECISION

### A. THE MAJORITY OPINION

The majority[89] initiated its discussion of *Sharpe* by reiterating the standards of a reasonable stop expounded in *Terry*.[90] First, a law enforcement official initially must be able to justify the stop.[91] The officer must have an "articulable and reasonable suspicion."[92] Second, the scope of the stop must be reasonable under the given conditions.[93] The majority stated that the court of appeals assumed that Cooke had a reasonable and articulable suspicion that respondents Sharpe and Savage were involved in the trafficking of contraband.[94] The majority concluded that the record supported this assumption.[95]

In determining if the scope of the stop was reasonable given the particular situation, the majority limited its inquiry to the detention

---

ment agents have probable cause to search a vehicle, the entire vehicle, including packages and containers therein, is subject to the search. *Id.* at 825.

83 *Sharpe*, 457 U.S. 1127 (1982).

84 United States v. Sharpe, 712 F.2d 65 (4th Cir. 1983).

85 *Id.*

86 *Id.* "Finding that *Ross* does not adversely effect our primary holding that the initial stop of the vehicle and the lengthy detention of the two defendants constituted an illegal seizures, we readopt the majority opinion as modified herein . . . ." *Id.*

87 *Id.*

88 104 S. Ct. 3531 (1984).

89 Chief Justice Burger delivered the opinion of the Court in which Justices Powell, Rehnquist and O'Connor joined.

90 *Sharpe*, 105 S. Ct. at 1573.

91 *Id.*

92 *Id.* (relying on Terry v. Ohio, 392 U.S. 1, 20 (1968)).

93 *Id.*

94 *Id.*

95 *Id.* The majority stated without further discussion: "That assumption [i.e., that Officer Thrasher and Agent Cooke possessed reasonable articulate suspicion] is abundantly supported by the record." *Id.*

of the driver of the pickup truck.[96] The majority recognized that the respondents wanted to suppress evidence of the marijuana.[97] The majority therefore reasoned that Sharpe's detention was irrelevant to the determination of this exclusion because the police discovered the marijuana only in the pickup driven by Savage.[98]

In analyzing Savage's detention, the majority concluded that Agent Cooke's actions were indeed reasonable given the particular circumstances.[99] The length of the detention did not transform it from an investigative search into a *de facto* arrest.[100] The majority distinguished its prior decisions in *Dunaway v. New York*,[101] *Florida v. Royer*,[102] and *United States v. Place*[103] from the facts in *Sharpe*.[104] The majority stated that in both *Dunaway* and *Royer*, where the respondents' motions to suppress illegally obtained evidence were upheld, the Court focused on the events that occurred during the respondents' detentions and not on the length of these detentions.[105] In addition, the majority concluded that the underlying rationale in *Place* primarily involved the failure of law enforcement officials to diligently pursue their investigation.[106] Therefore, the majority rejected the idea that its previous decisions precluded the validity of a twenty minute *Terry* stop.

Furthermore, the majority rejected the possibility of establishing a maximum time limit for investigative stops. In protecting law enforcement interests, the majority reasoned that law enforcement

---

96 *Id.* at 1574. "It is not necessary for us to decide whether the length of Sharpe's detention was unreasonable, because that detention bears no causal relation to Agent Cooke's discovery of marijuana." *Id.*

97 *Id.*

98 *Id.*

99 *Id.* at 1576.

100 *Id.*

101 442 U.S. 200 (1979). In *Dunaway*, police received information that was insufficient to obtain a warrant for the suspect's arrest. Nevertheless, police detained the suspect, took him to police headquarters and interrogated him. Subsequent to the questioning, the suspect made incriminating statements. The Supreme Court reversed the lower court's decision and upheld the petitioner's motion to suppress the evidence. *Id.* at 219.

102 460 U.S. 491 (1983). In *Royer*, the respondent, who was preparing to board a plane to New York City from Miami International Airport, fit the classic "drug-courier profile." After asking for identification and finding a discrepancy, detectives took respondent to a small room for further questioning. Without giving consent to a search, respondent unlocked one of his suitcases which contained marijuana. In upholding the respondent's bid to suppress the evidence, the Court held that the extent of the investigation was too intrusive. *Id* at 507-08.

103 *See infra* text accompanying notes 28-36.

104 *Sharpe*, 105 S. Ct. at 1574.

105 In discussing *Royer*, the majority stated: "As in *Dunaway*, though, the focus was primarily on facts other than the duration of the defendant's detention—particularly the fact that the police confined the defendant in a small airport room for questioning." *Id.*

106 *Id.* at 1575.

agents must have sufficient flexibility to respond to the demands of particular situations.[107] Thus, the majority stated: "Much as a 'bright-line rule would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria."[108]

In lieu of a precise time limit, the majority established a diligence test to determine whether the duration of a detention is too long.[109] The majority held that the length of a stop is reasonable as long as law enforcement officials *diligently* employ methods of investigation that will "confirm or dispel their suspicions quickly."[110] The majority further emphasized that the mere existence of a less intrusive investigative approach does not mean that a particular detention of an individual constitutes an illegal seizure.[111] Only if law enforcement officials act unreasonably in failing to recognize or follow the less intrusive method would employment of a more intrusive method be unconstitutional.[112] The majority also added that the swiftness with which a situation develops must be taken into account to determine the reasonableness of an officer's actions.[113]

The majority therefore concluded that the facts in *Sharpe* did not reveal any unnecessary delays in the investigation.[114] The majority emphasized that the respondent caused the ten to fifteen minute delay by cutting between the Pontiac and Officer Thrasher's patrol car.[115] Furthermore, Agent Cooke attempted to contact Officer Thrasher and diligently carried out his investigation of both respondents Sharpe and Savage.[116] In light of this diligence, the majority held that the twenty minute stop of respondent Savage was not unreasonable and therefore reversed the decision of the court of appeals.[117]

---

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.* at 1576. The majority was concerned with the Court's prior statement in *Royer* that the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Royer*, 460 U.S. at 500.

112 *Sharpe*, 105 S. Ct. at 1576. "The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it." *Id.*

113 *Id.*

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.*

B. JUSTICE MARSHALL'S CONCURRENCE IN THE JUDGMENT

Justice Marshall rejected the majority's opinion for two reasons. First, Justice Marshall contended that the majority clearly belittled the brevity requirement for *Terry* stops.[118] Relying on *Dunaway v. New York* and *United States v. Place*, Justice Marshall asserted that a legally valid *Terry* stop must satisfy two criteria.[119] The intrusion on the individual must be minimal and the law enforcement interest must outweigh the privacy interests that the stop violates.[120] Justice Marshall further stated that the length of the stop "in and of itself" can produce a level of intrusiveness that can only be supported by probable cause.[121] He concluded that this observation was consistent with previous Supreme Court decisions that stated that *Terry* stops be brief.[122]

Justice Marshall recognized three pragmatic considerations for adhering to the requirement that *Terry* stops be brief regardless of law enforcement interests. First, adherence to the brevity requirement would force law enforcement agents to use the least intrusive means to complete an investigation.[123] Second, a strict application of the brevity requirement would establish an objective standard so that courts would not have to vary their determination of "reasonableness" on the basis of what law enforcement resources were available to the officer.[124] Moreover, with an objective standard, courts would not have to analyze whether alternative investigative methods ought to have been employed.[125] Third, a strict brevity requirement would eliminate inconsistent and confusing decisions that would re-

118 *Id.* "I write separately, however, because in my view the Court understates the importance of *Terry's* brevity requirement to the constitutionality of *Terry* stops." *Id.* at 1577. Justice Blackmun also filed a brief concurring opinion. Prior to the grant for certiorari for the case, respondents Sharpe and Savage became fugitives. Justice Blackmun stated that he would have vacated the Court of Appeals' decision on this basis alone. *Id.* at 1576-77.

119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.* Justice Marshall cited United States v. Hensley, 105 S. Ct. 575 (1985) ("A detention might well be so lengthy or intrusive as to exceed the permissible limits of a *Terry* stop"), as well as *Royer*, 460 U.S. at 500 ("[A]n investigative detention must be temporary."), among others in footnote 1.

123 *Id.* at 1579.

124 *Id.* at 1580. Justice Marshall stated: "And if due diligence takes as fixed the amount of resources a community is willing to devote to law enforcement, officials in one community may act with due diligence in holding an individual at an airport for 35 minutes while waiting for the sole narcotics detection dog they possess, while officials who have several dogs readily available may be dilatory in prolonging an airport stop even 10 minutes . . . . Constitutional rights should not vary in this manner." *Id.*

125 *Id.* at 1579.

sult from a subjective standard.[126] Justice Marshall stated that these decisions would produce " 'friction and resentment' " between police and the courts.[127]

Justice Marshall recognized that the Supreme Court had not yet had the opportunity to explicitly specify the outer limits of a permissible investigative stop.[128] As such, Justice Marshall established his own standards. He asserted that any stop that lasts longer than the time necessary to obtain the suspect's identification, ask questions and perform a brief frisk produces the presumption of a *de facto* arrest.[129] However, this presumption may be dissipated if it is shown that the extended detention was not unduly intrusive.[130] Justice Marshall conceded that one situation in which an extended stop is not unduly intrusive is when the suspect causes the prolonged detention.[131] Justice Marshall, however, rejected the notion that a stop can be extended solely because law enforcement needs mandate additional time.[132]

Nonetheless, Justice Marshall found that the facts of the case made the majority's ultimate judgment acceptable.[133] Once Agent Cooke caught up with Officer Thrasher and respondent Savage, the investigation took only several minutes. He concluded that because respondent Savage's own evasive action caused the initial ten to fifteen minute delay the investigative stop was not unduly intrusive and therefore, did not violate Savages's constitutional rights.[134]

In addition to placing greater importance on the brevity requirement than the majority, Justice Marshall also wrote separately because he felt that the majority decided whether Agent Cooke had reasonable suspicion without a sufficiently developed factual record.[135] Justice Marshall attacked the majority's conclusion that the

---

126 *Id.* at 1580.

127 *Id.* at 1580 (quoting, Schwartz, *Stop and Frisk*, 58 J. CRIM. L.C. & P.S. 443, 439 (1967)). The friction and resentment that Justice Marshall referred to is based, in part, on the shame a policeman would experience among his colleagues for having overstepped the bounds of permissible police action. Without a clear cut standard, police officers have to balance the varying interests. Similarly, in the absence of an objective standard, courts may be fickle in deciding these balancing cases. Thus, although an officer may think he has acted reasonably, a court may decide otherwise. *Id. See* Schwartz, *Stop and Frisk*, 58 CRIM. L.C. & P.S. 443, 449 (1967).

128 *Sharpe*, 105 S. Ct. at 1581.

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.* In addition, Justice Marshall rejected the American Law Institute's suggestion that the maximum time limit of a *Terry* stop be 20 minutes. *Id.*

133 *Id.* at 1582.

134 *Id.*

135 *Id.* at 1582-83.

record " 'abundantly' " supported the court of appeals' assumption that the detention of respondents Sharpe and Savage was initially justified.[136] In Justice Marshall's view, the limited factual record did not clearly establish that Agent Cooke had the necessary reasonable suspicion to stop the respondents.[137]

### C. JUSTICE BRENNAN'S DISSENT

Justice Brennan dissented from the majority's opinion for the following reasons: 1) the facts of the case as stated by the majority indicated that the detention of Savage and Sharp should not have been determined by *Terry* stop criteria; 2) the majority made a "de novo" factual determination when it stated that Savage attempted to elude Officer Thraser; and 3) the majority failed to apply the precedential requirements of previous *Terry* cases.[138] Justice Brennan recognized that flight from law enforcement officials, in conjunction with pre-existing suspicion, is a fact that generally elevates an officer's reasonable suspicion to a level of probable cause.[139] Therefore, he reasoned that if one accepted the majority's interpretation of the facts, respondent Savage's evasion of Officer Thrasher would have given Thrasher probable cause to arrest.[140] Under these circumstances the majority did not have to apply *Terry* principles because the detention was a legal arrest.

However, Justice Brennan stated that the record was unclear as

---

136 *Id.* Justice Marshall stated several reasons for attacking the majority's conclusion. First, the court of appeals did not consider evidence presented to the district court showing the density of pickup trucks in the area. Part of Officer Cooke's reasonable articulable suspicion was based on the type of vehicle respondent Savage was operating. Second, Justice Marshall denied the implication that the respondents were trying to evade police when they sped through the campground road *See supra* note 44. Finally, Justice Marshall contended that the district court was improperly influenced by the fact that four or five other similar stops were made that morning. He stated that the Court used this information when it decided whether Agent Cooke had reasonable articulable suspicion. *Sharpe*, 105 S. Ct. at 1582-83.

137 *Id.* at 1584.

138 *Id.* at 1585-93. Justice Stevens also dissented. His dissent, however, like Justice Blackmun's concurrence, *see supra* note 118, centered on the fugitive status of the respondents. Stevens stated that the appeal involving a fugitive respondent should be dismissed because the absence of one of the parties produces the risk that the adversarial process of the courts will not function properly. *Id.* at 1594-97.

139 *Id.* at 1585. Justice Brennan relied on Sibron v. New York, 392 U.S. 40 (1968), among other cases, to support his point. In *Sibron*, the Court stated "deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea*, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest." *Sibron*, 392 U.S. at 66-67.

140 *Sharpe*, 105 S. Ct. at 1586.

to whether Savage's actions actually constituted an evasion.[141] Justice Brennan supported this idea by recognizing that Officer Thrasher gave only an inconclusive response when questioned about Savage's "evasive" efforts at trial.[142] Based on the ambiguity of the record, Brennan stated that the majority's assumption that Savage purposely evaded law enforcement officials was an exercise in fact finding.[143]

Moreover, Justice Brennan claimed that the majority failed to recognize the precedential directives presented by the *Terry* line of cases.[144] He stated that the brevity requirement is an "important constitutional safeguard" that the majority disregarded.[145] Furthermore, he emphasized that according to the decision in *Florida v. Royer*, the government bears the burden of showing that law enforcement agents used the least intrusive methods reasonably available to complete the investigation.[146] Justice Brennan concluded that the majority ignored these requirements by adopting a less stringent standard than the brevity requirement.[147]

## VI. ANALYSIS

### A. TWO TESTS FOR DETERMINING IF THE LENGTH OF A *TERRY* STOP IS REASONABLE

In *Sharpe*, Justice Marshall and the majority produced two different tests for evaluating whether, in the absence of probable cause, the length of a seizure is reasonable. Justice Marshall advocated an intrusiveness-brevity test. Under this test courts would ultimately decide whether the length of a detention was "minimally intrusive" on an individual's privacy rights.[148] A court would determine whether a stop was exceedingly intrusive by applying a strict brevity requirement. This brevity requirement would demand that an investigative stop be only so long as is necessary to reasonably

---

141 *Id.* at 1587.

142 *Id.* Defense counsel asked "Would you say the pickup truck was attempting to allude [sic] you or just passed you by thinking you had stopped the car?" Thrasher responded, "[W]ell I was across . . . partially in two lanes and he got by me in the other lane . . . ." *Id.*

143 *Id.*

144 *Id.* at 1588-89.

145 *Id.* at 1592-93.

146 *Id.* at 1589.

147 *Id.* at 1593. "The Court today has evaded these [precedential] requirements, failed even to acknowledge the evidence of bungling, miscommunication, and reasonable investigative alternatives and pronounced simply that the individual officers 'acted diligently.' " *Id.*

148 *Id.* at 1578.

question, identify and, if necessary, frisk an individual.[149] Typically, this time entails several minutes.[150] Courts would consider those stops within this time limit to be minimally intrusive and, therefore, valid *Terry* stops. However, courts would make the presumption that those stops exceeding this time limit are no longer minimally intrusive. Unless the state could rebut this presumption, the court would consider the detention to be an illegal arrest.

One instance whereby the state could rebut the presumption that a detention is excessively intrusive is when the suspect himself causes the extended length of the stop. In applying the intrusiveness-brevity test, Justice Marshall stated that respondent Savage's own evasive actions caused the twenty minute delay, thereby rebutting the presumption that the detention was overly intrusive.[151] Thus, under the intrusiveness-brevity tests, courts that find a suspect extended his own detention would hold that the length of the stop did not violate that individual's fourth amendment rights.

In contrast, the majority in *Sharpe* recommended that a diligence test should determine the reasonableness of the length of a *Terry* stop.[152] Under the diligence test, courts must decide whether an officer was diligently investigating the source of his reasonable suspicion.[153] Normally, as long as a law enforcement agent actively pursues a reasonable investigative method to dispel his reasonable suspicion, courts will consider the length of the stop to be within the directives of the fourth amendment.[154] Even under this test, however, courts must still keep in mind that an overly extended investigative stop is an illegal *de facto* arrest.[155] Thus, if an officer detains an

---

149 *Id.* at 1581.

150 *Id.* "I agree that *Terry's* brevity requirement is not to be judged by a stopwatch but rather by the facts of particular stops. At the same time, the time it takes to 'briefly stops [the] person, ask questions, or check identification,' *United States v. Henseley*, and, if warranted, to conduct a brief pat-down for weapons, see *Terry*, is typically just a few minutes." *Id.*

151 *Id.*

152 *Id.* at 1575. *See supra* text accompanying notes 109-10.

153 "In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm their suspicions quickly . . . . *Id.*

154 *Id.* In supportings its position, the majority cited a footnote in Michigan v. Summers, 452 U.S. 692 (1981). The footnote states: "Professor LaFave has noted that the reasonableness of a detention may be determined in party by 'whether the police are diligently pursuing a means of investigation which is likely to resolve the matter one way or another very soon . . . .' 3 W. LAFAVE, SEARCH AND SEIZURE § 9.2, 40 (1976)." *Summers*, 452 U.S. at 701 n.14. The majority in *Sharpe* appeared to base its theory primarily on the plan delineated by Professor LaFave. 3 W. LAFAVE, SEARCH AND SEIZURE § 9.2(f), 35-44 (1978). (hereinafter cited as SEARCH AND SEIZURE).

155 *Sharpe*, 105 S. Ct. at 1575. *See also Place*, 462 U.S. at 710.

individual: 1) without actively pursuing a viable investigative method to either confirm or dispel his suspicion, or 2) after his suspicion has been dispelled, or 3) for an extensively long period of time, an illegal arrest has taken place.[156]

### B. THE DILIGNCE TEST AND STRICT TIME LIMITATIONS

In adopting the diligence standard, the *Sharpe* majority emphasized the Supreme Court's previous reluctance to establish a rigid time limitation on *Terry* stops. The majority justified this emphasis by referring to *United States v. Place*, where the Supreme Court rejected the American Law Institute's suggested twenty minute maximum for *Terry* detentions.[157] The rationale underlying this rejection was that a rigid time limit would not provide law enforcement officials with the flexibility necessary to respond to a variety of situations. The *Place* majority commented: "Such a limit would undermine the equally important need to allow authorities to graduate their responses to the demands of any particular situation."[158] Thus, by referring to the Supreme Court's reasoning in *Place*, the *Sharpe* majority ultimately focussed on the need for flexibility in establishing a test to determine the proper limits on the duration of a *Terry* stop.

By comparison, the diligence test provides much greater flexibility to law enforcement officials than Justice Marshall's intrusiveness-brevity test. One situation which clearly highlights this difference is when a police official's reasonable suspicion increases subsequent to the initial stop. Under the diligence test, if the suspect's explanation of the situation is questionable or is known to be false, thus increasing the level of reasonable suspicion, the officer has the authority to continue the investigation.[159] Under the intru-

156 Although the situation where an officer's suspicion is dispelled is not addressed by the majority in *Sharpe*, it naturally follows from *Terry* standards. Once an officer's reasonable suspicion is dispelled, he no longer has the level of suspicion which originally justified the stop. In State v. Watson, 165 Conn. 577, 345 A.2d 532 (1973), *cert. denied*, 416 U.S. 960 (1974), the Supreme Court of Connecticut stated: "The results of the initial stop may arouse further suspicion or may dispel the questions in the officer's mind. If the latter is the case, the stop may go no further and the detained individual must be free to go." *Id.* at 585, 345 A.2d at 537. The court however ultimately decided that the detention of four men suspected of robbing a hotel room was a reasonable detention under the fourth amendment. *Id.* at 586-91, 345 A.2d at 538-39.

157 *See supra* note 35.

158 *Place*, 462 U.S. at 709 n.10.

159 *See* Harris v. United States, 382 A.2d 1016 (1978). In *Harris*, two police officers observed the appellant walking from a parking lot with a guitar case and a tape deck. One of the officers was aware of the high incidence of auto thefts in the area. The officers stopped the appellant and asked for identification. The appellant stated that his identification was in "his car." When the officers and the appellant arrived at the car,

siveness-brevity test, however, increasing reasonable suspicion would not affect what constitutes a reasonable length of a stop. Although an officer's level of suspicion could reach probable cause if the officer had the opportunity to obtain additional information, the intrusiveness-brevity test would require the officer to terminate the detention once the reasonable time limit has expired. Justice Marshall acknowledged this difficulty when he stated, "[D]ifficult questions will no doubt be presented when during these few minutes an officer learns enough to increase his suspicions but not enough to establish probable cause."[160] Thus, the diligence test, as opposed to the intrusiveness-brevity test, conforms with the Supreme Court's rationale for refusing to establish a strict time limitation on *Terry* stops.

### C. THE ASSUMPTIONS UNDERLYING THE DILIGENCE STANDARD

Although the diligence test corresponds to the Supreme Court's rejection of a rigid time limitation, the *Sharpe* majority presented no other justification for advocating this standard. Moreover, by adopting the diligence standard the majority interpreted the second prong of the *Terry* test to include balancing the government's interest in law enforcement against an individual's fourth amendment rights. The majority explicitly demonstrated this balancing practice when it weighed the relative importance of the brevity requirement against law enforcement concerns. The majority stated:

> While it is clear that the brevity of the invasion of the individual's Fourth Amendment interest is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on

---

the appellant stated that his wife had dropped him off and that without the keys he was unable to enter the vehicle. The appellant suggested that the officers take him to two other locations where other persons could verify his explanation. After the appellant was unable to get someone to verify his story at the first location, the officers temporarily stopped at a restaurant. During further questioning by one of the officers, the appellant admitted that he had stolen the property. *Id.* at 1017-18. In holding that the twenty-five minute detention of the appellant was constitutional the court stated that "where the facts ascertained during such an encounter gradually escalate toward probable cause, reasonable extension of the duration of the stop to await the outcome of further police investigation is justified." *Id.* at 1019. *See also* SEARCH AND SEIZURE, § 9.2(f) at 39. Professor LaFave states: "Thus, if a person is stopped on suspicion that he has just engaged in criminal activity, but the suspect identifies himself satisfactorily and investigation establishes that no offense has occurred, there is no basis for further detention, and the suspect must be released. On the other hand, if the suspect's explanation needs to be checked out, and in particular if his explanation is known to be false in some respects, there is reason to continue the detention somewhat longer while the investigation continues." *Id.* (footnotes omitted).

160 105 S. Ct. at 1581.

> reasonable suspicion, we have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes.[161]

Underlying this interpretation of the second prong of the *Terry* test is the implicit assumption that the scope of an individual's fourth amendment rights may vary and that courts should define the scope of these rights by focusing on law enforcement needs. Justice Marshall pointed out that under the diligence standard an individual's constitutional rights are dependent on the interests of law enforcement.[162] Courts will consider the validity of a *Terry* stop by examining the actions of police rather than the actual intrusion on the detainee.[163] Thus, as long as police are diligently pursuing an investigation, the length of a stop can vary significantly despite the fact that large increases in the length of the detention substantially increase the infringement on the suspect's fourth amendment rights.

This interpretation of the *Terry* test and its underlying assumption are contrary to the rationale developed in the *Terry* line of cases. First, the majority in *Terry* applied a balancing test exclusively to the first part of its two pronged test, i.e., to determine whether the search was initially justified.[164] The *Terry* majority did not balance the law enforcement interest against the individual's fourth amendment rights when it considered whether the scope of non-probable cause searches were reasonable.[165] In applying a balancing test to the first prong of its test, the *Terry* majority demonstrated that non-probable cause searches were only permissible in a limited group of situations. Moreover, the *Terry* majority's election not to apply a balancing criterion to the second prong of its test demonstrated the Supreme Court's desire to strictly limit the scope of non-probable cause detentions. Although the *Terry* majority recognized the need to allow non-probable cause searches when police safety was at stake, the majority was not willing to allow the scope of these searches to vary in response to the government's law enforcement needs.

Likewise, in cases subsequent to *Terry*, the Supreme Court maintained a strict limitation on the scope of *Terry* stops despite a substantial change in the initial justifications and purpose of non-

---

161 *Id.* at 1575 (citations omitted).

162 *Id.* at 1580.

163 *Id.*

164 *Terry*, 392 U.S. at 22-27.

165 *See* Dunway *v.* New York, 442 U.S. 200, 209-10 (1979) (Justice Brennan discussed the limited number of situations in which *Terry* dententions are permissible).

probable cause detentions. In *Terry*, the initial justification for a search without probable cause was to ensure police safety.[166] However, in *Almeida-Sanchez v. United States*[167] and *United States v. Brignoni-Ponce*[168] the Supreme Court expanded the initial justification for *Terry* stops to include the prevention of illegal immigration. Similarly, in *Florida v. Royer*[169] the Supreme Court again expanded the field of *Terry* stop justifications. The *Royer* Court acknowledged the possible validity of *Terry* stops intended to detect trafficking in illegal narcotics.[170] By moving from *Terry* to *Royer* the Supreme Court changed the perspective of *Terry* stops from an exclusively protective function to an investigative role. Under the second prong of the *Terry* test, the scope of the stop should be reasonably related to the stop's initial justification.[171] However, notwithstanding the fact that a detention aimed at the discovery and accumulation of evidence requires a substantially greater amount of time than a protective search, the Supreme Court refused to recognize a significant expansion in the scope of *Terry* stops.[172] Rather, the Supreme Court ad-

166 *Terry*, 392 U.S. at 29.

167 413 U.S. 266 (1973). In *Almeida-Sanchez*, the Supreme Court considered whether a United States Boarder Patrol officer could stop a suspect near the Mexican boarder without reasonable suspicion. The Court reversed the court of appeals judgment recognizing the validity of such random stops. *Id.* at 275. Justice Powell, however, in his concurrence recognized that under appropriate limiting circumstances the government's interest in curbing illegal immigration may produce the equivalent of probable cause. *Id.* at 279.

168 422 U.S. 873 (1975). In *Brignoni-Ponce*, a United States Boarder Patrol agent stopped a car and questioned the occupants about their citizenship. The agent's only justification for making the stop was that the occupants of the vehicle appeared to be of Mexican ancestry. *Id.* at 874-75. Despite holding that the agent did not possess the reasonable suspicion necessary to make the stop, the Court recognized the validity of *Terry* detentions intended to detect illegal immigration. The Court stated: "In this case as well, because of the importance of the governmental interest at stake, the minimal intrusion of a brief stop and the absence of practical alternatives for policing the boarder, we hold that when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car and briefly investigate the circumstances that provoke suspicion." *Id.* at 881.

169 *See supra* note 102.

170 *Royer*, 460 U.S. at 498-99. Justice White, writing for the majority, implied that the Supreme Court's decision that DEA agents illegally detained respondent Royer did not indicate that all temporary detentions undertaken to suppress illegal drug trafficking were permissible. *Id.*

171 *Terry*, 392 U.S. at 20.

172 One frequently cited decision that appears to express the contrary viewpoint in Michigan v. Summers, 452 U.S. 692, 700 (1980). Justice Stevens, writing for the majority, stated that "the exception for limited intrusions that may be justified by special law enforcement interests is not confined to the momentary, on-the-street detention accompanied by a frisk for weapons involved in *Terry* and *Adams*. *Id.* In the footnote corresponding to the text, however, Justice Stevens' reference to Professor LaFave's description of permissible investigative techniques indicates that Justice Stevens was primarily distinguishing the time needed to frisk an individual from the time needed to

hered to its strict brevity standard. Thus, in *Almeida-Sanchez* and *Brignoni-Ponce* the Court recognized the brief nature of the suspects' detentions.[173] Similarly, the *Royer* majority explicitly stated that *Terry* stops must be "temporary" and that the "investigative methods employed should be the least intrusive means reasonably available. . . ."[174] Therefore, the decision to strictly construe the scope of *Terry* stops, despite the opportunity to expand this scope, reflected the Supreme Court's emphasis on the protection of an individual's fourth amendment rights.

This emphasis with regard to the scope of *Terry* stops further implied that courts should consider the intrusiveness of a stop from the perspective of the detainee. Such a perspective is thoroughly consistent with the Supreme Court's previous decisions in fourth amendment cases. In *United States v. Mendenhall*,[175] the Supreme Court considered the parameters for determining when a "seizure" takes place. DEA agents approached the suspect at Detroit Metropolitan Airport and subsequently asked her if she would follow them to the DEA office for further questioning.[176] Upon her arrival at the office, the suspect consented to a search of her person and DEA officials discovered two small packages of heroin.[177] In holding that the DEA agents had not "seized" the suspect, Justice Stewart stated that courts should consider whether a reasonable person would have considered themself free to walk away from law enforcement officials during their encounter with them.[178] Although Justice

---

briefly question him. *Id.* at n.12. Clearly, the latter requires a greater length of time. Justice Stevens did not reject the brevity requirement as the footnote states: " 'There is no reason to conclude that any investigative methods of the type just listed are inherently objectionable; they might cast doubt upon the reasonableness of the detention, however, if their use makes the period of detention unduly long . . . .' " *Id.* at n.12 (quoting SEARCH AND SEIZURE, § 9.2(f) 36-37).

173 In *Brignoni-Ponce*, Justice Powell emphasized that the intrusion on the suspect was "modest." *Brignoni-Ponce*, 422 U.S. at 880. Furthermore, he stated that the minimal intrusion of a brief stop was one of the factors the court considered in determining whether *Terry* stops undertaken to detect illegal aliens were permissible. *Id.* at 881.

174 *Royer*, 460 U.S. at 500.

175 446 U.S. 544 (1980).

176 *Id.* at 547-48. The two agents originally asked for the suspect's identification and airline ticket. The names on the suspect's driver's license and airline ticket were different. After questioning the suspect about the discrepancy and the length of her stay in California, the investigators identified themselves as DEA agents. The suspect subsequently became very nervous and had difficulty speaking. *Id.*

177 *Id.* at 549.

178 *Id.* at 554. Only Justice Rehnquist joined Justice Stewart in this portion of his opinion. Justice Powell, Justice Blackmun and Chief Justice Burger concurred in the Court's decision that DEA agents had not violated the suspect's fourth amendment rights. However, they determined that the suspect had in fact been "seized." *Id.* at 573. Justice Powell justified the legality of the detention by stating that the DEA agents pos-

Stewart did not specifically state that courts should view fourth amendment rights from the perspective of the detainee, by establishing the reasonable man standard, he clearly avoided establishing the law enforcement perspective as a controlling criterion.

Moreover, in *United States v. Martinez-Fuerte*,[179] the Supreme Court considered the constitutionality of permitting Boarder Patrol agents to stop vehicles at a permanent checkpoint near the Mexican boarder.[180] In holding that reasonable suspicion was not a prerequisite for such stops, the court focused its analysis on the detainee's perception of the seizure.[181] The Court stated that motorists are much less likely to be frightened or concerned by checkpoint stops because of the routine and public nature of these detentions.[182] As such, the court stated that these stops were minimally intrusive.[183] The Court, therefore examined the intrusion from the perspective of the detainee.

The Supreme Court's initial interpretation of the two prongs of the *Terry* test along with its other fourth amendment decisions indicate that the test for determining the reasonable duration of a *Terry* stop should consider the intrusiveness of these detentions from the perspective of the detainee. Justice Marshall's intrusiveness-brevity test satisfied this requirement. The underlying assumption of the intrusiveness-brevity test is that an individual's fourth amendment rights are not variable.[184] By strictly limiting the length of *Terry* stops, the intrusiveness-brevity test minimizes the actual intrusion on the detainee. This focus on intrusion that the suspect will experience, as opposed to a focus on the intent and action's of law enforcement officials, corresponds to the Supreme Court's earlier interpretation of *Terry* detentions.

## VII. CONCLUSION

In *United States v. Sharpe*, the Supreme Court determined the reasonableness of a twenty minute investigative stop. The majority

---

sessed reasonable suspicion of illegal activity and that the suspect had voluntarily consented to the search. *Id.* In a footnote, however, Justice Powell stated that he did not reject the reasonable man standard, but merely felt that given the facts of the case an individual would not reasonably have believed that he was free to leave. *Id.* at 560 n.1. *But see*, United States v. Forero-Rincon, 626 F.2d 218, 219 n. 3 (2d Cir. 1980) (stating that *Mendenhall* is not controlling because of the lack of a majority view).

179 428 U.S. 543 (1976).

180 *Id.* at 545.

181 *Id.* at 558-60.

182 *Id.* at 558.

183 *Id.* at 560.

184 *Sharpe*, 105 S. Ct. at 1580.

stated that the test used to determine reasonableness is whether the law enforcement agent diligently pursued the investigation in an acceptable manner. Justice Marshall, on the other hand, suggested that a *Terry* stop is reasonable only if the stop is minimally intrusive to the detainee. He indicated that intrusiveness should be measured by an intrusiveness-brevity test.

The majority's adoption of the diligence test satisfied the need for flexibility in the administration of law enforcement. However, choosing a standard to determine the reasonable limits of the duration of a *Terry* stop on the basis of the needs of law enforcement is contrary to the underlying intention of *Terry v. Ohio*. The *Terry* Court's refusal to use a balancing test to determine the proper scope of non-probable cause searches along with the Supreme Court's subsequent narrow interpretation of the second prong of the *Terry* test both indicate the Court's original intention to strictly limit the duration of *Terry* stops. Furthermore, a test designed to limit the intrusion on the suspect's fourth amendment rights must evaluate this intrusion from the suspect's viewpoint. Because Justice Marshall's standard strictly limits the actual intrusion on the suspect's fourth amendment rights, the intrusiveness-brevity test, as opposed to the diligence test, more appropriately represents the intentions of *Terry v. Ohio*.

DAVID J. KULOWIEC